SEPARATION AGREEMENTS UNDER THE ENGLISH LAW.

AS the common law of England is expounded to-day, a husband and wife may, by their voluntary agreement, divorce themselves as to everything except the right to contract another marriage.[1] As the law was two hundred years ago, they could not in the slightest degree modify the status created by the union.[2] The process by which the change was wrought, the influences that made themselves felt, and the forces that swerved the current of decisions until its course was reversed, form an interesting chapter in the history of English jurisprudence.

The early law was simple. The twain were one. While the common law courts said they had no power to treat marriage as other than a civil contract, yet they held it to be an indissoluble agreement.[3] The union was absolute, and could end only with the death of one of the parties. If there were ante-nuptial barriers, if one of the parties was impotent, or if they were within the prohibited degrees of relationship, there might be an application to the spiritual court, which could decree that for such reason there never was a marriage.[4] If the married state was rendered intolerable by adultery or cruelty the same court could grant a separation from bed and board, but not an absolute divorce.[5] To this unique tribunal, whose jurisdiction included that shadowy realm where legal accountability shades off into mere moral obligation, or religious duty, the unhappy pair must apply. How troublesome the cases were to deal with, the record fully discloses. In the long and often tedious opinions wherein all the petty troubles of discordant spouses are philosophized upon at inordinate length, the curious reader may see outlined the working of the minds of the men who were at once the priests and judges of their people. But one proposition they never forgot nor departed from.

"This court considers a private separation as an illegal contract, implying a renunciation of stipulated duties — a dereliction of those mutual offices, which the parties are not at liberty to desert — an assumption of a false character, in both parties, contrary to the real *status personae*, and to the obligations which both of them have contracted in the sight

[1] Besant *v.* Wood, 12 Ch. Div. 605. [2] 1 Blk., Com., 441. [3] Ib. 434.
[4] Ib. 434, 435. [5] Ib. 441.

of God and man, to live together 'till death them do part,' and on which the solemnities, both of civil society and of religion, have stamped a binding authority, from which the parties cannot release themselves by any private act of their own, or for causes which the law itself has not pronounced to be sufficient, and sufficiently proved."[1]

So long as the marital status was administered upon by that court there was no departure from this proposition.

While in a certain sense it was not a common law court, yet it administered the law of the realm as to all matters touching marriage, and the settlement of estates. It declared the unwritten law of the land upon these subjects. Nor was it a tribunal existing independent of the source of all civil power, the king. While the inferior judges were appointed by the ecclesiastics, the bishops themselves received their nominations from the sovereign. From the decrees of the court as thus constituted an appeal lay to the king, who was represented for that purpose by the court of delegates. "This commission is frequently filled with lords, spiritual and temporal, and always with judges of the courts at Westminster and doctors of the civil law."[2] Thus the court came in contact with and was in fact a part of the English judiciary. The law so administered is a part of the common law of England.[3] In this court the rule that deeds of separation are not pleadable[4] was adhered to until the court was abolished in 1857.[5]

There are some early cases wherein the chancery court assumed the power to decree support to the wife in case of dereliction from duty by the husband. Thus, in Seeling *v.* Crawley,[6] the husband had agreed with his wife's father that the wife and their child should be supported in the father's house and at the husband's expense. A bill was brought by the father, in which the wife joined, and performance of the agreement was decreed. It does not appear that any agreement to separate entered into the facts upon which the decree was based. The case merely states that "they agreed to part." There is nothing to indicate that the father was a party to this compact. In other cases decided about the same time, the chancellor decreed maintenance to the wife after there had been proceedings for a separation in the ecclesiastical court.[7]

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[1] Mortimer *v.* Mortimer, 2 Hagg. Consist. 310.
[2] 3 Blk., Com., 66.
[3] Reg. *v.* Millis, 10 Cl. & F. 534.
[4] Mortimer *v.* Mortimer, 2 Hagg. Consist. 310.
[5] 20 & 21 Vict. c. 85.
[6] 2 Vern. 386.
[7] Oxenden *v.* Oxenden, 2 Vern. 493; s. c. Gilbert 1; Nicholls *v.* Danvers, 2 Vern. 671.

These cases seem to involve an invasion of the jurisdiction of the last mentioned court, and are probably to be accounted for by the confused ideas concerning the limits of their respective powers incident to and following after the abolition of the ecclesiastical tribunal during the period of the commonwealth.[1]

In 1721, one of these agreements was incidentally drawn in question in a case before the king's bench. The uncongenial pair had separated, and property was settled upon the wife. Thereafter the husband repented of his course (apparently as to the maintenance only), and, asserting the ancient claim to complete control over the weaker vessel, forcibly seized her and incarcerated her in the royal mint. She did not choose to submit to such indignity, and sued out a writ of *habeas corpus*. The court granted her prayer for liberty, but the reason for the action taken is left in doubt. The reporters fail to agree. One of them credits the court with using the following language: —

"An agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again; and, if the wife be willing to return to her husband, no court will interpose or obstruct her. But, as to the coercive power which the husband has over his wife, it is not a power to confine her; for by THE LAW OF ENGLAND she is entitled to all reasonable liberty, if her behaviour is not very bad." [2]

According to this report the court was doubly sure of its ground. First, the agreement cut off his right to imprison her; and second, he had no such right to lose. Strange gives a different version of the judicial utterance. He says: —

"And, all this matter appearing, and that he declared he took her into his power in order to prevail with her to part with some of her separate maintenance, the chief justice declared, and all the rest agreed, that where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company, it is lawful for the husband, in order to preserve his honor and estate, to lay such a wife under restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty; that there was no color for what he did in this case, there being a separation by consent." [3]

If this is the correct statement of the opinion the reliance upon the case as an authority for the validity of such arrangements has been an error. It only decides that for certain causes the husband

[1] 1 Fonb., Eq., 97 note.
[2] Lister's Case, 8 Mod. 22.
[3] Rex *v.* Lister, 1 Str. 478.

may restrain the wife, and then goes on to show that none of the causes existed in the case under consideration.

In 1725 the family troubles of Sir Cleaves More came before the court. His wife was living apart from him, and had property payable by trustees to whom she should appoint. Upon his forcibly retaking her, she offered to appoint a part of the property to him as a price for her freedom. The proposition was agreed to, the appointment was made, and she went her own way. The trustees took a different view of the matter, and declined to honor the appointment. The husband brought suit and recovered.[1] There was no discussion of the question whether his agreement to permit her to renew the adulterous intercourse from which he had taken her was a valid contract. At times the case has been cited as an authority for the validity of separation agreements. The better opinion is that expressed by an early text-writer: The wife could appoint the property to whom she chose, and for such act no consideration was needed.[2]

In 1747 Lord Chancellor Hardwicke had occasion to examine the law upon the subject. He stated the result of his investigations as follows: —

"As to the liberty prayed for, it is not in the power of the court to decree it, and I do not find that this court ever made a decree for establishing a perpetual separation betwixt husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this unwillingly." [3]

The first case that in terms held a separation agreement to be a valid contract was decided in 1757. John Wilkes sued out a writ of *habeas corpus* to obtain the custody of the person of his wife, who was living with her relatives under an agreement with him. The court held the agreement to be a formal renunciation by the husband of his right to seize her or force her back to live with him.[4] The case is imperfectly reported; but apparently correctly states what was decided, as none of its critics have suggested that there was any error in that respect. It was the subject of much adverse comment. Lord Eldon said of it: —

"When I see such *dicta* as occur in the case of *King* v. *Mead* falling from great men, and establishing a course of decision that can be demon-

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[1] More *v.* Freeman, Bunb. 205.

[2] 2 Roper, Hus. & Wife, 294 note.

[3] Head *v.* Head, 3 Atk. 547.

[4] Rex *v.* Mead, 1 Bur. 542.

strated to stand upon no principle consistent with the law of the land, I feel great difficulty in deciding upon such authority." [1]

Shortly after it was decided, the court of chancery dismissed a bill because it set up a separation agreement.[2] A few years later Blackstone declared that a suit could not be maintained against a married woman, "except in the known excepted cases of abjuration, exile, and the like; where the husband is considered as dead, and the woman as a widow." [3]

It was thus that the English common law stood in 1780. In all proceedings for the settlement of estates, in suits for nullity and such limited divorce as was obtainable, these agreements were wholly void. Courts of chancery refused to recognize them, and their efficacy was denied in the later cases before the common bench. This state of affairs contrasted sharply with that in continental Europe. There the husband and wife could contract with each other, and she might be sued without joining him.[4]

It was about this time that Lord Mansfield appears to have first given the matter serious attention. For a quarter of a century he had been remodelling the common law with the free hand of a modern legislator. Sitting nominally as the Chief Justice of a court that interpreted the law, he in fact created the law of negotiable paper, insurance, and other subjects closely connected with the commercial interests of the people. That the reforms were needed is too apparent to require elaboration. Whether the end justified the extraordinary means used is not a question to discuss here. It is only important to notice the tendency to legislate as bearing upon the weight to be accorded to the decisions rendered.

It is equally apparent that the continental idea must have appealed strongly to Lord Mansfield. He was deeply versed in and an ardent admirer of the civil law, while his feeling towards the common law bordered upon contempt. His object seems to have been to shape the law so as to promote the commercial greatness of the people. Considerations looking solely to the preservation of domestic ties would find little favor with him, when placed in the balance over against what might be termed a good business proposition. Although a man of high character, he had little of human affection. His great admirer, Lord Campbell, says of him: —

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[1] St. John *v.* St. John, 11 Ves. 526.

[2] Wilkes *v.* Wilkes, 2 Dick. 791.

[3] Hatchett *v.* Baddelly, 2 Wm. Bl. 1079; Lean *v.* Schutz, Ib. 1195.

[4] Cod. Jur. Civ. 4, 12, 1; 1 Burge, Com. Col. & For. Laws, 262 *et seq.*

"He had no warmth of affection; he formed no friendships; and he neither made exertions nor submitted to sacrifices purely for the good of others. The striking fact to prove that he *reasoned* rather than *felt* is, that he never revisited his native land, from the time when he first crossed the border riding a Highland pony on his way to Westminster; although he left behind him his father and mother, who survived many years, and were buried in the church at Scone." [1]

In 1783 the question came before him in the following manner. Lord and Lady Lanesborough had separated, and property was settled upon her. His lordship removed to Ireland while she continued to live in England, and there contracted sundry debts. Suits being brought therefor, she set up her coverture as a defence. Lord Mansfield said:—

"The agreement of separation bound both the parties in the same manner as if they had been sole, and the court will not suffer either of them to break through it. Under the agreement the wife possesses a separate property. She is no longer under the control of her husband, and creditors, even for necessaries, have no remedy against him. Credit was given to her as a single woman; and shall she now be permitted to say that she was not single? . . . We are of opinion that the case resembles abjuration or exile in every particular, that the wife therefore may be sued alone, and that she cannot avail herself of this most iniquitous defence." [2]

In the following year he reiterated his views:—

"The general principle of law is against her liability. But *quicquid agant homines* is the business of courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of abjuration, &c. The fashion of the times has introduced an alteration, and now husband and wife may, for many purposes, be separated, and possess separate property, a practice unknown to the old law." [3]

Finally, in 1794, he declared the doctrine to be firmly settled. A few sentences will show the line of reasoning:—

"Lord and Lady Percy, by a deed, mutually agree to live separate; neither can break this agreement. . . . The claim upon which the action is founded is of a most meritorious nature. . . . In justice, then, she ought to pay this debt. . . . In the ancient law there was no idea of a separate maintenance; but when it was established, what said the courts?

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[1] Lives of the Chief Justices.

[2] Ringsted *v.* Lanesborough, 3 Doug. 197.

[3] Barwell *v.* Brooks, 3 Doug. 371.

That the husband shall not be liable, even for necessaries; and they said so because convenience and justice required it. . . . I am of opinion the present case is quite determined by the two late ones, which . . . rest . . . upon the great principle which the court has laid down, 'that where a woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such.'" [1]

It is curious to note that in this case Lord Mansfield's most ardent admirer, Sir Francis Buller, relied like a black letter pleader upon the precedents established by his chief. In the face of the admitted legislation in those cases, he gravely declared that "as to the prudence of the measure, that is no ground on which the court can found their decision."

These cases involved a wide departure from the theory of the common law. Moved to indignation by the seeming injustice to the too confiding tradesmen, the Chief Justice had overlooked the weightier matters involved. The effect of the decisions upon the marital status, the fact that they made limited divorce a thing to be had by the mere agreement of the parties, was not considered by the court. These matters were but little discussed while Lord Mansfield remained upon the bench.

In 1786 he was compelled by the ills incident to his fourscore years to retire to his estate at Kenwood. He was solicitous that his favorite associate, Sir Francis Buller, should become his successor, and for two years held the office of Chief Justice without being present in court; while Justice Buller in fact discharged the functions of the office. At last Lord Mansfield realized that further opposition to the wishes of Thurlow and Pitt was useless. A parliamentary investigation of the situation was threatened, the Chief Justice resigned in 1788, and Lloyd Kenyon, Master of the Rolls, was appointed his successor. Sir Francis Buller stifled his chagrin for about five years, and then resigned to accept a seat upon the inferior court of the common bench.

Lord Kenyon had risen to his high station through many difficulties. Born to the lot of a second son of a poor Welsh squire, scantily educated and articled to an attorney at the age of fourteen, he had little opportunity to acquire knowledge, except of the law. Of the polite learning of the day he was profoundly ignorant. He knew nothing of the amenities of social life, and scarcely regarded its decencies. During the years of his practice his work had been largely writing opinions for more prosperous and less well informed members of the profession, and it was by rendering this sort of

[1] Corbett *v.* Poelnitz, 1 T. R. 5.

assistance to Lord Thurlow that he first came to be appointed to office.

The contrast between the new Chief Justice and his predecessor was striking. Mansfield was an accomplished man of the world, and a finished orator. Kenyon was a recluse, with no gift of speech. Mansfield was for reform and progress, and did not always scan too closely the way that sufficed for the time to carry him to his conclusion. Kenyon was the disciple of precedent, and followed where the black letter *dictum* led, no matter what the result. Instead of entertaining that high opinion of each other's good qualities which sometimes makes fast friends of those of opposite natures, they failed utterly to see any good in each other, and their personal dislike for one another was intense. Kenyon believed that he had been snubbed by Mansfield; and Mansfield openly expressed his contempt for the man who was ignorant of the classics.

It may be that these facts had no influence upon the decisions rendered; but it is of interest to note that the results are such as would have been brought about had such causes been allowed to operate. Accordingly, we find Justice Buller at all times adhering to the views expressed by Lord Mansfield. In 1788, while sitting for the Lord Chancellor, he declared that separation deeds were valid when fairly entered into, and that courts of equity had jurisdiction to enforce performance of the same.[1] Shortly thereafter, and while acting in the same capacity, he remarked, *obiter*, that it had been decided that as to everything but the right to remarry the parties could divorce themselves.[2] This is the first plain statement to be found in the reports of the legitimate result of the innovations introduced by Lord Mansfield. It did not pass unchallenged. The case was sent out for the opinion of the common pleas upon the law, and Chief Justice Loughborough declared that the question of the liability of a wife to a suit, when living apart from her husband, was still an open one.[3]

In 1790 the ecclesiastical court once more declared its adherence to its earlier decisions.[4] Two years later the Master of the Rolls followed the *dictum* of Justice Buller, and decreed specific performance of an agreement to live separate, and that, too, in spite of the husband's offer to renew cohabitation.[5] The case was not

[1] Fletcher *v.* Fletcher, 2 Cox Ch. 99.
[2] Compton *v.* Collinson, 2 Bro. Ch. 377.
[3] S. C. 1 H. Bl. 334.
[4] Nash *v.* Nash, 1 Hagg. Consist. 140.
[5] Guth *v.* Guth, 3 Bro. Ch. 614.

followed, and in a short time Lord Chancellor Loughborough denied that equity had any jurisdiction of suits involving the marital relation.[1]

In 1792 Justice Buller again went outside what was necessary to dispose of the case in hand in order to declare his continued adherence to the views of his late chief. One J. Greygoose petitioned for a writ of *habeas corpus* to bring up the body of his wife, who was detained by the defendant. One defence set up, but imperfectly pleaded, was a separation agreement, and Rex *v.* Mead was relied upon. Justice Buller said: "If this case turn out on further examination to be like that in *Burrow*, I am strongly inclined to think that this would be an answer to the writ. But that is not at present made out." [2] The absence of the Chief Justice when the decision was rendered, explains why the *dictum* was passed by in silence.

Lord Kenyon first had occasion to consider the question in 1794. While he found other grounds upon which to dispose of the case, he indulged in these characteristic comments: —

"I confess that I do not think that the courts ought to change the law so as to adapt it to the fashion of the times; if an alteration in the law be necessary, recourse must be had to the legislature for it." [3]

This was after Justice Buller had retired from the king's bench. Two years later Lord Kenyon spoke in a similar strain: —

"We must not by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land. It descended to us as a sacred charge, and it is our duty to preserve it." [4]

In 1800 the vexed question arose in a case before Lord Chancellor Eldon. He said that he would not decide it, because it was already pending in a case that was shortly to be argued before all twelve judges. He did not, however, deny himself the pleasure of reviewing and pointing out the errors in the opinions of the late Chief Justice.[5] His motive may have been an eminently proper one; but we are unable to keep out of view his hostility to Lord Mansfield. He never forgot his early experiences before the king's bench, nor relinquished the belief that he was driven therefrom to practice in the more obscure chancery court by the partiality of

[1] Legard *v.* Johnson, 3 Ves. 352.
[2] Rex *v.* Winton, 5 T. R. 89.
[3] Ellah *v.* Leigh, 5 T. R. 679.
[4] Clayton *v.* Adams, 6 T. R. 604.
[5] Beard *v.* Webb, 2 Bos. & P. 93.

the Chief Justice for "young lawyers who had been bred at Westminster School and Christ Church."

The case referred to by Lord Eldon was regarded by the court as an important one. It was twice argued before all the judges, except Justice Buller, who at the time of the second hearing was confined to the house by the illness from which he died the following summer. Lord Kenyon expressed his sympathy for Sir Francis "whose absence on every account we had occasion to regret." How much of the regret was Pickwickian we are not informed.

The unanimous opinion of the court was delivered by the Chief Justice. To make assurance doubly sure, he announced the concurrence of Chief Justice Eyre of the common bench, who sat at the first argument, but retired before the last. The gist of the opinion, overruling the decisions of Lord Mansfield, is as follows: —

"The ground on which the plaintiff in this case rests his claim is an agreement between the defendant and her husband to live separate and apart from each other. That is a contract supposed to be made between two parties, who, according to the text of *Littleton, f.* 168, being in law but one person, are on that account unable to contract with each other; and if the foundation fail, the consequence is that the whole superstructure must also fail. This difficulty meets the plaintiff *in limine*. If it did not, and the parties were competent to contract at all, it would then become material to consider how far a compact can be valid which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married, and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character. In the course of the argument some of these difficulties were pointed out, and it was asked whether, after such an agreement as this, the temporal courts could prohibit it if either were to sue in the ecclesiastical court for restitution of conjugal rights? Whether the wife, if she committed a felony in the presence of her husband, would be liable to conviction? Whether they could be witnesses for and against each other? Whether they could sue and take each other in execution? And many other questions will occur to every one to which it will be impossible to give a satisfactory answer. For instance, it may be asked how it can be in the power of any persons by their private agreement to alter the character and condition which by law results from the state of marriage, while it subsists, and from thence to infer rights of action and legal responsibilities as consequences following from such alteration of character and condition? Or how any power short of that of the legislature can change that which, by the com-

mon law of the land, is established as the course of judicial proceedings?" [1]

However much one is disposed to admire the elegant and accomplished William Murray, Baron of Mansfield, to smile at the crudities, or carp at the ill-temper and stiff will of Lloyd Kenyon, it must be admitted that in this instance reason and precedent were with the latter. The clamor of indignant tradespeople, and the well-bred murmur of disapproval from scandalized society, alike fell upon deaf ears. If the mercer would collect his bill, let him be chary who he trusted. If social vices must be glossed over with a so-called separation contract, the court was not to be made a partner in the scheme. That was the law. If changes were needed, apply to Parliament.

Soon the doughty Welshman followed his Scotch rival down to the common level. Lord Kenyon died in 1802, and was in turn succeeded by an implacable enemy. Sir Edward Law acquired fame from his defence of Warren Hastings, and was thereafter conceded the leadership of the bar. From that time he felt sure of his position, and freely used his powers of sarcasm in holding the oddities and shortcomings of the Chief Justice up to ridicule. When he took his seat upon the bench, he said to a friend that "his feelings as a barrister had been so often outraged by the insults of Lord Kenyon, he should now take care that no gentleman at the bar should have occasion to complain of any indignity in his court." [2] He forgot the good resolution before adjourning his first term of court, and apparently never thought of it thereafter.

Upon the second day he presided, the new Chief Justice (who had taken the sonorous title of Baron of Ellenborough) had occasion to pass upon a separation agreement. George Chambers and the Honourable Jane Rodney, his wife, having had differences, entered into a compact whereby he agreed to make certain payments to trustees for her, in case of a future separation. That event soon took place, the payments were not made, and the trustees brought suit upon the agreement. The case was argued upon the question of the general invalidity of such covenants, and especially to the point that one for a future separation is void. The Chief Justice declared that the contract was valid because "the question which has been agitated appears to have been laid at rest for a long time

[1] Marshall *v.* Rutton, 8 T. R. 545.

[2] Campbell's Lives of the Chief Justices.

by repeated decisions and the uniform practice of the courts." As to the question of future separation, he thought this agreement no worse than others that had been upheld.[1]

Marshall *v.* Rutton was not cited by counsel, nor alluded to by the court. Counsel very likely had a lively recollection of the fact that at the last hearing of that case Sir Edward Law argued for the plaintiff, against whom judgment was thereafter rendered. Justices Grose, Lawrence, and Le Blanc, who now wrote opinions concurring with the Chief Justice, thought silence the most discreet way to avoid the conflict between their decision against Sir Edward as an advocate and their concurrence with him as their chief. They conveniently overlooked the battle that had just been fought over the question of the power of parties to modify the marital status; and, going back a hundred years, relied upon ill reported cases from the chancery side of the court. Nichols *v.* Danvers [2] was a case where there was a separation by agreement. There was also a decree for maintenance. Vernon noted only these facts, and the case is reported as one wherein an agreement to live apart was enforced. The register's book shows that there had been proceedings in the ecclesiastical court for cruelty, and this was only an application for alimony, in accordance with the practice after the Restoration.[3] These facts were overlooked by the editors of the Vernon manuscript, in a manner quite characteristic of their reportorial work.[4] It is upon this case that Rodney *v.* Chambers depends.

If any one is seeking evidence to sustain the theory that these agreements are calculated to promote improper ways of living, he may be interested in the sequel to Lord Ellenborough's decision. Three years after its rendition the husband recovered a verdict of £2000 from one Caulfield because of his adultery with the plain-

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[1] Rodney *v.* Chambers, 2 East 283.

[2] 2 Vern. 671.

[3] 1 Fonbl., Eq., 97 note.

[4] The ignominy of having palmed off upon the profession the two volumes that bear his name ought not to be charged to the memory of that really excellent lawyer. He took extensive notes, but apparently for his own use only. After his decease there was a lively contest over the manuscript. The executor claimed it as an asset of the estate, the widow thought it was bequeathed to her as a part of the household goods, and the heir insisted it was his as the guardian of his ancestor's reputation. Finally it was agreed that it should be printed by the court without profit to any one. Atcherly *v.* Vernon, 10 Mod. 518, 530. The unpalatable truth, suggested by counsel for the heir in argument, that the manuscript was "possibly not fit to be printed," was not heeded. So it came about that the name of Vernon has been handed down to the present generation as a synonym for shiftless reporting, when in fact he was an accomplished lawyer, and never thought himself a reporter at all.

tiff's wife.[1] In this case the Honourable Jane becomes plain Mrs. Chambers.

Lord Ellenborough's views were not favorably received. Lord Eldon at once expressed a strong disapproval of the case and the theories that it advocated. But he reluctantly conceded that if the practice of upholding the covenants as to property rights had become fixed he could not overturn it.[2]

The Court of Common Pleas were unable to agree upon the question whether a husband was liable for necessaries furnished to his separated wife because of his failure to perform his contract for her support.[3] The associate justices thought he was liable; while the Chief Justice, Sir James Mansfield, dissented, basing his opinion upon the reasoning of Lord Mansfield.

Sir William Grant, Master of the Rolls, considered the agreement as void, except as to property rights. He said: —

"I apprehend it to be now settled that this court will not carry into execution articles of separation between husband and wife. It recognizes no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract. It should seem to follow that the court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." [4]

He added, however, that the cases seemed to establish the validity of the property arrangement; and so he gave effect to an appointment by a separated wife of property deeded by her husband to trustees, in consideration of their promise to save him harmless from her debts, etc.

In 1818, the ecclesiastical court once more declared its adherence to the doctrine that the agreement was void. Sir William Scott, of the consistory court of London, was in full sympathy with his more distinguished brother, Lord Eldon. He declared the position of the ecclesiastical courts as follows: —

"These courts therefore to which the law has appropriated the right of adjudicating upon the nature of the matrimonial contract, have uni-

[1] Chambers *v.* Caulfield, 6 East 244.
[2] St. John *v.* St. John, 11 Ves. 526.
[3] Nurse *v.* Craig, 2 Bos. & P. (N. R.) 148.
[4] Worrall *v.* Jacob, 3 Mer. 256.

formly rejected such covenants as insignificant in a plea of bar, and leave it to other courts to enforce them, so far as they may deem proper upon a more favorable view (if they entertain it) of their consistency with the principles of the matrimonial contract."[1]

Lord Eldon had the question before him again in 1821. He dismissed a bill brought for the cancellation of a separation deed, upon the ground that its invalidity was as available a defence at law as in equity. In speaking of the character of the instrument he said: —

"I perceive that it seems to have struck every one as extraordinary that such deeds should ever have been supported. . . . It has always seemed to me very difficult to hold these deeds legal. It seems to be admitted that a mere agreement to live separate is one that would not be deemed valid; and it seems strange, as Sir William Grant observes, that if the primary object be vicious, these auxiliary provisions should be held good and thereby the objects which the law objects to should be carried into effect."[2]

Other chancery judges looked at the matter differently. Richards, Lord Chief Baron of the Exchequer, said: —

"The question is not what the law ought to be, but what it is; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point and settling the law."

Baron Graham added: —

"The language of regret is certainly found to be used by many of the judges; but the law is clearly established, and such demands have been constantly enforced."[3]

In cases arising soon after this it was decided that the agreement was valid so far as it related to a provision for the wife,[4] but invalid if separation did not take place until a future day.[5]

Still the law seemed far from being settled. Notwithstanding many rebuffs from the courts, the conveyancers persisted in advising the use of the tabooed contract. There was practically no divorce obtainable, and this sort of an armistice was the only relief to be had from a union that had proved unendurable. The agreement was made, and the parties trusted to each other's honor to carry it out. If, however, the wife saw fit to resist a suit, her coverture was a defence and the agreement only a rope of sand.

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[1] Mortimer *v.* Mortimer, 2 Hagg. Consist. 310.

[2] Westmeath *v.* Westmeath, Jac. 126.

[3] Ross *v.* Willoughby, 10 Price 2.

[4] Jee *v.* Thurlow, 2 B. & C. 547; Wilson *v.* Mushett, 3 B. & A. 743.

[5] Hindley *v.* Westmeath, 6 B. & C. 200.

In 1835 the matter first came up for consideration in the House of Lords. The question was whether a separated wife could acquire a domicile of her own. The office of Chancellor being vacant, Lord Brougham presided. If his opinion does not carry the weight a different authorship might give, it is an interesting specimen of the work of a versatile writer and fairly accurate judge. In speaking of the agreement he said: —

"What is the legal value or force of this kind of agreement in our law? Absolutely none whatever, in any court whatever, for any purpose whatever, save and except only one, — the obligation contracted by the husband with trustees to pay certain sums to the wife, the *cestui que trust.* In no other point of view is any effect given by our jurisprudence, either at law or in equity, to such a contract. No damages can be recovered for its breach; no specific performance of its articles can be decreed. No court, civil or consistorial, can take notice of its existence. So far has the legal presumption of cohabitation been carried by the common law courts that the most formal separation can only be given in mitigation of damages, and not at all as an answer to an action for criminal conversation, the ground of which is the alleged loss of comfort in the wife's society; and all the evidence that can be adduced of the fact of living apart, and all the instruments that can be produced binding the husband to suffer the separate residence of his wife, — nay, even when he has for himself stipulated for her living apart, and laid her under conditions that she should never come near him, — all is utterly insufficient to repel the claim which he makes for the loss of her society, without doing any act either in court or *in pais* to determine the separation or annul the agreement." [1]

The concurrence of Lord Lyndehurst is a strong indorsement of the soundness of the decision. At this time both these ex-Chancellors were plotting and scheming to again take possession of the great seal. They presided by turns over the judicial sessions of the House of Lords during the spring of 1835, and neither lost an opportunity to criticise the other.[2]

At about this time suit was brought in the common pleas for money agreed to be paid as a consideration for executing a separation deed. The court admitted that a promise to separate in the future, or any inducement to make such a promise, was illegal. On the other hand, a present separation was declared to be good. The deed was construed as one of the latter class.[3] The appeal to the exchequer resulted in an affirmation by a divided court, Lord

[1] Warrender *v.* Warrender, 2 Cl. & F. 488.

[2] Campbell's Lives of the Chancellors.

[3] Waite *v.* Jones, 1 Bing. N. C. 656.

Denman and Baron Abinger dissenting. The opinion of Chief Justice Denman is of especial value. It had been long since the position had been filled by one of so high character, broad general culture, and excellent judgment. In plain and convincing language he disapproved of the whole doctrine of separation by agreement, and modestly stated his conclusion as follows: —

"If I could venture to lay down the principle which alone seems to be safely deducible from all the cases, it is this; that when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant." [1]

By 1842 the case had travelled the long journey to the House of Lords. The contract was again upheld in a brief opinion. There was no reference to the strong language indorsed by that august tribunal only seven years before; and Lord Brougham himself concurred in the decision.[2]

From this time the courts seem to have been fairly committed to the theory that these agreements were valid except as to the one provision that was of the essence of each of them. While the judges acknowledged that the situation was illogical, they rested upon the now useful doctrine of *stare decisis.*

"It is in vain to regret the perplexities in which courts have found themselves involved by enforcing the minor and auxiliary parts of the agreement to separate, while they profess to repudiate the principal and essential part and motive of it." [3]

In 1848 the House of Lords went further, and, holding the agreement to continue to live apart to be a valid contract, decreed specific performance of its covenants.[4] Their lordships admitted that the decision was contrary to the old law, and based their conclusion upon recent cases. The deed in question was one executed as a part of the settlement of the wife's suit for nullity in the ecclesiastical courts, and the case might have been disposed of without the radical steps that were taken.

Soon after this, Lord Romilly, Master of the Rolls, considered the statement that such deeds had been upheld "in a great number

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[1] Jones *v.* Waite, 5 Bing. N. C. 341.
[2] Jones *v.* Waite, 4 M. & G. 1104.
[3] Frampton *v.* Frampton, 4 Beav. 287.
[4] Wilson *v.* Wilson, 1 H. L. C. 538.

of cases" a sufficient reason for enjoining a breach of a covenant not to interfere with a separated wife.[1]

An occasional remonstrance was still heard. In 1858 the court of chancery declared that the sole foundation of these contracts was a covenant that no court would enforce.[2] In general, however the tendency to uphold the agreements was followed.[3]

Lord Chancellor Westbury enjoined a separated wife from bringing suit for restitution in the divorce court, because such action would violate the terms of a separation deed. The divorce court succeeded the ecclesiastical tribunal in 1857,[4] and administered the law in a similar manner.[5] The chancellor justified the decision by reasoning that separation deeds were valid, although the ecclesiastical doctrine was different, because by a statute of Henry VIII. the ecclesiastical law was made subordinate to the common law; that the decision of the House of Lords in Wilson *v.* Wilson, overruling the earlier cases, must be treated like a statute; and that while a voluntary separation was an offence against the ecclesiastical law, it was not one against the common law, and therefore the rights in controversy were only private, and public policy was not involved.[6] A decision of the appeal to the House of Lords was prevented by the death of Mrs. Hunt.

Sir George Jessel, Master of the Rolls, treats the matter in the following characteristic fashion:—

"For a great number of years both ecclesiastical judges and lay judges thought it was something very horrible, and against public policy, that husband and wife should agree to live separate; and it was supposed that a civilized country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. But a change came over judicial opinion as to public policy, other considerations arose, and people began to think that, after all, it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the consequence might be that they would live separately; and that was the view carried out by the courts when it became once decided that separation deeds *per se* were not against public policy."[7]

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[1] Sanders *v.* Rodway, 16 Beav. 207.

[2] Vansittart *v.* Vansittart, 2 DeG. & J. 249.

[3] Webster *v.* Webster, 1 Sm. & G. 489; Randle *v.* Gould, 8 El. & B. 457; Williams *v.* Baily, L. R. 2 Eq. 731; Rowley *v.* Rowley, L. R. 1 H. L. Sc. 63; Gibbs *v.* Harding, L. R. 8 Eq. 490.

[4] 20 & 21 Vict. c. 85.

[5] Ib. s. 22.

[6] Hunt *v.* Hunt, 4 DeG., F., & J. 221.

[7] Besant *v.* Wood, 12 Ch. Div. 605.

Sir George was a Hebrew, and the first Jew to attain to judicial honors in England. It would be natural that law founded in part upon Christian ecclesiastical polity should find scant favor with him.

The case has an added interest for the American student because of the career of the wife, Annie Besant. While she was advocating female suffrage and preaching the doctrines of theosophy from American platforms, a long and bitter struggle was being waged in the English courts over her domestic relations. Her clerical husband agreed to a separation, and as a part of the arrangement each parent was to have the custody of one of their two children. Thereafter he sued for and obtained the custody of the child who he had solemnly covenanted should remain with the mother. Thereupon the wife, conceiving that, as the consideration for the agreement had been taken from her by the court, it was no longer binding upon her, sought to renew cohabitation.

"But the court deemed that the policy of the law made her agreement for separation controlling over her, and the consideration for it void as to him. This exquisitely refined principle of high honor does not pertain to the laws of so young a people as we are." [1]

Following out the same theory, the court of probate and divorce held a contract not to demand restitution valid; and that, as the act of 1873 had made all defences available there which would be anywhere, the agreement could be pleaded in bar.[2]

Finally, to show that all the old notions upon the subject had been exploded, it was decided in 1888 that a trustee was not needed, and the parties could make the contract directly with each other.[3] The case does not depend upon modern statutes enlarging the powers of married women. It is expressly put upon common law ground.

It remains to be seen whether the higher courts are to follow these extreme cases. It seems probable that they will.[4]

It is difficult for us here to realize the extent to which the idea that "social policy" [5] demands the upholding these agreements prevails there. Another fruitful source of evil has been the great number of family settlements each more or less tainted with such

[1] 1 Bish., Marr. & Div., s. 634a, note.

[2] Marshall *v.* Marshall, 5 Prob. Div. 19.

[3] McGregor *v.* McGregor, L. R. 20 Q. B. D. 529.

[4] Rowell *v.* Rowell, [1900] 1 Q. B. 9; Hunt *v.* Hunt, [1897] 2 Q. B. 547; Sweet *v.* Sweet, [1895] 1 Q. B. 12.

[5] Wennhak *v.* Morgan, 20 Q. B. D. 635.

covenants. Seventy-five years ago, the title to half the property in England stood in the name of nominal owners.[1] The family conveyancer, possessed of the secret of the family skeleton and anxious to be its sole guardian, has ever been ready to promote a "settlement" that would avoid the public scandal of a divorce suit. Still another potent cause for what has occurred was the fact that practically no divorce was obtainable. A separation from bed and board might be decreed, but that mockery is not worthy the name of divorce.

These are the causes that created the undercurrent and dragged the law from its ancient and safe moorings. The departure from established principles was slow, but none the less certain. First the undoubted rule was announced that an agreement by the husband to support his wife was but a performance of a part of his duty. This was quickly seized upon by the conveyancers, and the result was a great number of annuities and other settlements, ostensibly made for the purpose of furnishing support, and each in fact depending upon an illegal promise to live separate. For a time a decent regard for the old law was shown, and the promise of a trustee to furnish support was always a part of the contract. Then this concession to old-fashioned ideas was abandoned, and courts enforced property covenants admittedly founded upon an illegal promise. Nor was this the end of judicial sophistry. The next step was to argue that while on the face of things the courts had gravely declared the covenant for separation to be invalid, yet by enforcing agreements dependent thereon they had in reality held the whole to be good. The opposition to this line of reasoning was constant for many years. The names of some great English jurists are found among those opposed to the continental idea. They believed that the marital status is something more than a mere civil contract relation; and that its modification is not to be accomplished, except with the consent of the state as evidenced by the decree of a competent court. Nevertheless the so-called liberal idea seems to have finally prevailed, and the *dictum* of Justice Buller is now the law of England. As to everything but the right to remarry the parties may divorce themselves.

R. J. Peaslee.

MANCHESTER, N. H.

[1] 2 Kent, Com., 182.